

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of

Docket: 041-479-L

Group Art: 2126

Examiner: LeChi Truong

Date: April 15, 2004

Lev Smorodinsky

To FAX: 703-872-9306

Ser. No. : 09/705,441

Filed : Nov. 2, 2000

For: Method For Server Farm  
Configuration Optimization

QUERY ON EXAMINERS ACTION DATED 3/25/2004

Commissioner of Patent and Trademarks  
Washington , D.C. 20231

Sir:

Attached is a copy of page 2 of the Office Action of 3/25/2004.

This states that claims 1-11 are unpatentable over claim 27 of  
US Patent 6,571,283.

Note that US 6,571,283 has 18 claims-----AND THERE IS NO  
SUCH CLAIM AS CLAIM 27.

Please advise with another office action to clarify this rejection  
And to set a new period of time for response.

Respectfully submitted,

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**DETAILED ACTION**

1. Claims 1-11 are presented for examination.

***Double Patenting***

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, (14 USPQ 330) (CCPA 1957); and *In re Vogel*, 422 F.2d 438, (164 USPQ 619) (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

2. Claim 1-11 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 27 of copending application Serial No. 09/474,706 (Patent application)(in view of Lev Somorodinsky, patent no. 6,571,283 B1). Although the conflicting claims are not identical, they are not patentably distinct from each other because both methods for server configuration optimization comprise substantially the same element. The differences between the patent application and this case are more limitations: "selecting for input said particular number of clients "n" for utilizing said server Farm; selecting for input one parameter for said single Server Farm cost evaluation; selecting for input one parameter for said down-time cost evaluation" and "said single Server Farm cost evaluation; said downtime cost evaluation; said sever Farm optimization parameter" (e.g note lines 14-19 and ln 24-27).

***Claim Rejections - 35 USC § 103***